



1401 K ST. NW
SUITE 600
WASHINGTON, DC 20005
(202) 640-2850
WWW.KAISERDILLON.COM

wpittard@kaiserdillon.com

December 5, 2016

Hon. Lindsey O. Graham
Chairman, Subcommittee on Crime and Terrorism
Committee on the Judiciary
U.S. Senate

Hon. Sheldon Whitehouse
Ranking Member, Subcommittee on Crime and Terrorism
Committee on the Judiciary
U.S. Senate

Re: Testimony for Subcommittee Hearing, Scheduled for December 6, 2016

Dear Chairman Graham and Ranking Member Whitehouse:

Thank you for inviting me to submit this testimony. It is an honor to do so.

The Subcommittee on Crime and Terrorism rightly is concerned about the chilling effect, on Legislative Branch staff engaged in oversight, of Executive Branch referrals, investigations, and potential prosecutions of those staff for that activity. The oversight responsibility is one of the fundamental functions of this Branch. It is of paramount importance. Our Founding Fathers vested this Branch with that responsibility particularly as a bulwark against an over-reaching Executive—a concern that history has validated.

You need not take my word for it:

- In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), the Supreme Court observed that “the whole American fabric has been erected” on the principle of Separation of Powers.
- James Madison, in the Federalist Papers (No. 48), emphasized that “[N]one of [the three branches] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.”

- In another of the Federalist Papers (No. 51)—this one which may have been penned by the much-in-vogue Alexander Hamilton, who generally is thought to have been one of the loudest pro-Executive voices among the Founders—this observation is stressed: “[T]he great security against a gradual concentration of the several powers in the same department[] consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”
- And, one more: The Supreme Court has quoted with approval Woodrow Wilson’s admonition:

“Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. . . . The only really self-governing people is that people which discusses and interrogates its administration.”

Hutchinson v. Proxmire, 443 U.S. 111, 132 (1979) (quoting W. Wilson, Congressional Government 303 (1885)).

And yet the fundamental oversight duty is not an easy one. People and entities subject to oversight rarely welcome it, and the Executive Branch benefits from great powers of its own—and from a centralization of authority that can focus those powers against those not meeting its favor. That includes Members of the House and of this body. And it certainly includes the staff of the Members, committees, and other institutions of the House and this body—staff that the Supreme Court has recognized are “so critical to the Members’ performance that they must be treated as the latter’s alter egos.” *Gravel v. United States*, 408 U.S. 606, 616-17 (1972).

I am proud to have represented many Legislative Branch officials, both Members and staff. I did so particularly while serving in the Office of General Counsel for the House—a non-partisan office similar to this body’s Senate Legal Counsel. There, I saw first-hand what each of you already knows: the inherent vulnerability of Legislative Branch staff:

- They typically garner modest to minimal incomes.
- They often are relatively early in their careers and thus have few assets on which to draw, and a limited reputation and network on which to fall back.

- They often hold or aspire to security clearances, which may be required for their current or future positions—and which presently are dispensed, and renewed, solely by the Executive Branch.
- And, they generally work for bosses who necessarily are keenly aware of, and responsive to, public opinion. Even the hint of a potential investigation endangers their careers.

Consider, for example, a typical oversight staffer who finds himself or herself the subject of an Executive Branch investigation into his or her means of gathering information in support of a committee's oversight. He or she perhaps has worked on the Hill for a few years, and with sufficient distinction to merit a committee job. But the salary is limited, particularly if there are kids or others to support. His or her friends generally are in the same limited financial position. And so, even if the relevant Ethics Committee permits donations to help defray legal expenses, those donations are likely limited. The staffer then is quickly in debt, and substantially so. His or her security clearance may suffer. Word of the investigation often will leak. There likely will be no end point on the horizon, as the Executive Branch only rarely provides the satisfaction (and peace of mind) of formally closing an investigation. In other words, Legislative Branch oversight staff face incredible pressure to conform their behavior to that preferred by the Executive Branch.

Would the Executive Branch actually investigate or threaten to investigate (or forego doing so) based on political ideology, score-settling, or otherwise for its advantage? We do not have to enter the thickets of recent controversies to answer that question in the affirmative:

- As Congress uncovered in the 1920s, DOJ engaged in various improprieties in connection with the so-called Palmer Raids targeting individuals with suspected communist leanings.
- As Congress uncovered later in the same decade, DOJ declined to prosecute allies of the administration in connection with the Teapot Dome scandal.
- As Congress uncovered in the 1950s, DOJ worked to protect not just its allies but itself by preventing a grand jury from investigating Department wrongdoing.
- As uncovered in part through the work of the Senate's Church Committee in the 1970s, DOJ long monitored and sought to influence the activities of various political agitators, including Dr. Martin Luther King Jr., the NAACP, and women's rights groups.

There are many other examples. *See generally, e.g.,* Alissa M. Dolan & Todd Garvey, *Congressional Investigations of the Department of Justice, 1920-2012: History, Law, and Practice*, Cong. Research Serv. (Nov. 5, 2012).

And so what can be and should be done? I invite and encourage the Subcommittee's consideration of several proposals:

- *First*, a statutory requirement that investigations and prosecutions of Legislative Branch officials, for official conduct, be directed by an independent counsel, modeled on the statutory provisions approved by the Supreme Court in *Morrison v. Olson*, 487 U.S. 654 (1988).
- *Second*, the statutory imposition of certain internal review, approval, certification, and reporting requirements as to any DOJ investigation or prosecution of Legislative Branch officials, for official conduct. This might include:
 - Review and approval of any such investigation and/or prosecution by an internal DOJ review board;
 - Personal review and approval by the Attorney General;
 - Certification by the board and the Attorney General of a proper basis and motive for the prosecution;
 - A report by the Attorney General of any such investigation and/or prosecution to the Senate and House leadership (in line with the current reporting requirements of 28 U.S.C. § 530D); and
 - Additional, periodic reviews, approvals, certifications, and reports.
- *Third*, a resolution clearing the way for Senate staff to accept pro bono legal representation in connection with an investigation or other legal action against them, where that action or investigation relates to their service in the Senate.
- *Fourth*, the provision to Legislative Branch staff, at least as to the costs and fees associated with legal representation, of a right of indemnity and advancement, akin to what corporate law permits and often requires as to corporate officers and directors. There, the concern is ensuring that competent individuals will agree to corporate service. That concern is only magnified as to Legislative Branch service, and perhaps particularly so as to oversight staff. Indeed, this idea is already one recognized in federal government service: DOJ regulations (28 C.F.R. Parts 50.15 & 50.16) provide for the indemnification of legal fees and expenses for federal government employees under criminal investigation, facing civil lawsuits, or facing *congressional* scrutiny, where the activity apparently arose in the scope of the individual's federal employment. The Senate (and the House) might develop their own regulations—presumably through their respective Rules—providing similar, or more expansive, protections for their employees.

Hon Lindsey O. Graham & Hon. Sheldon Whitehouse

December 5, 2016


Page 5 of 5

- *Finally*, the creation of an alternative process for the grant and renewal of the security clearances of Legislative Branch staff. This might be done by having the Legislative Branch abandon its reliance on various Executive Branch agencies to conduct those reviews, or by creating an independent agency to administer all security clearances.

To be clear, I do not necessarily endorse any of the just-listed proposals, which in some cases are mutually exclusive and all of which would need development. Rather, I offer them for the Subcommittee's consideration in addressing a significant problem.

Thank you for the opportunity to submit this testimony; I look forward to the hearing.

Sincerely,

A handwritten signature in black ink, appearing to read "William Pittard". The signature is fluid and cursive, with the first name "William" and last name "Pittard" clearly distinguishable.

William Pittard